

LIABILITY FOR ECONOMIC HARM

CHAPTER 3

INTERFERENCE WITH ECONOMIC INTERESTS

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18 § 20 A. Bad-Faith Performance of First-Party Insurance Contract

19 **An insurer is subject to tort liability to its insured when:**

20 **(1) the insurer's claims processing of a first-party insurance policy lacks a**
21 **reasonable basis;**

22 **(2) the insurer knew of the lack of a reasonable basis or acted in reckless**
23 **disregard of the lack of a reasonable basis; and**

24 **(3) the insurer's deficient performance is a factual cause of harm to the insured**
25 **and within the insurer's scope of liability.**

26 **Comment:**

27 a. *History, terminology, scope, and cross-reference.* This Section covers “first-party”
28 insurance, which is insurance a person purchases for ~~*his or her*~~ protection from loss—or for the

1 protection of ~~his or her~~ family. Common examples include health insurance, life insurance, and
2 disability insurance. By contrast with first-party insurance, “third-party” insurance, sometimes
3 called “liability insurance,” covers liability risks of the insured, which occur when the insured is
4 sued by a third party for tortiously causing harm. Prior Torts Restatements did not address the
5 liability of first-party insurers who acted in bad faith in performing their obligations contained in
6 an insurance policy, as this tort first emerged in 1973 in the seminal case of *Gruenberg v. Aetna*
7 *Insurance Co.*, 510 P.2d 1032 (Cal. 1973), after the publication of the first two Volumes of the
8 Second Restatement of Torts, ~~in the seminal case of *Gruenberg v. Aetna Insurance Co.*, 510 P.2d~~
9 ~~1032 (Cal. 1973)~~. Bad faith by liability (third-party) insurers is addressed in Restatement of the
10 Law, Liability Insurance §§ ~~24, 27, 49~~; and 50 and incorporated by reference in Comment *b*.

11 Frequently, insurance policies are hybrids, containing coverage for first-party losses as well
12 as third-party losses. So, for example, both standard-form automobile policies and homeowners’
13 policies contain coverage for specified losses suffered by the insured as well as liability coverage
14 for certain tort claims by third parties. This Section addresses not just pure first-party policies (such
15 as life-insurance policies), but also the first-party coverages of those hybrid policies. Bad faith
16 arising from the liability aspects of those hybrid policies is covered in the Restatement of the Law,
17 Liability Insurance. See Comment *b*.

18 *b. Bad-faith performance of third-party insurance contracts.* Like their first-party
19 counterparts, liability insurers are subject to tort liability ~~when they operate in bad faith~~ for certain
20 actions. A liability insurer might incur such liability in one of two primary (though nonexclusive)
21 ways. First, a liability insurer might incur ~~bad-faith~~ tort liability if it breaches its duty to make
22 reasonable settlement decisions. That obligation—to settle liability claims reasonably—is peculiar
23 to liability insurance, requires only unreasonable conduct in the settlement context, and has no
24 counterpart in this Section. For ~~a~~ discussion, see Restatement of the Law, Liability Insurance §§ 24
25 and 27 (explaining that some jurisdictions ground this liability in tort while others rely on contract).

26 Second, a liability insurer might ~~also~~ incur bad-faith tort liability if it fails to perform its
27 contractual obligations without a reasonable basis for its conduct and with knowledge of its duty
28 to perform or in reckless disregard of its obligation to perform. *Those* third-party bad-faith claims,
29 which are very similar to the first-party claims addressed by this Section, are addressed in *id.* §§ 49
30 and 50. The provisions in the Liability Insurance Restatement are incorporated by reference in this
31 Restatement.

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1 *c. The special nature of insurance contracts.* Courts that impose tort obligations on insurers
2 often say that tort liability arises from insurers’ breach of the duty of good faith and fair dealing—
3 a duty implied in all contractual agreements. Yet, as many courts also acknowledge, bad-faith tort
4 ~~claims are~~liability is not ordinarily available for breach of contract. Nevertheless, consistent with
5 this Section, a strong majority of jurisdictions authorize bad-faith claims in the special context of
6 ~~insurance law~~insurance law ~~context~~. Courts explain this differential treatment by pointing to
7 exceptional aspects of an insuring agreement, which include the following realities: (1) there is a
8 significant disparity in market power between insurers and insureds, and, among other things, this
9 disparity results in contracts of adhesion for all standard-form policies of insurance; (2) the
10 insurance industry is suffused with public-interest concerns—its extensive regulation reflects the
11 public aspects of insurance; (3) concomitantly with (2), insurance contracts play a critical role in
12 the American economy by transferring and distributing risk—and, in so doing, these contracts
13 facilitate productive economic activity; (4) insureds rely on insurance—and insureds reasonably
14 expect that insurers will perform at the time when losses have been incurred and when financial
15 compensation is urgently needed; (5) some insureds are economically fragile and vulnerable,
16 particularly after suffering a significant loss; and (6) without bad-faith liability, there exist
17 inadequate alternative mechanisms to ensure that insurers will promptly and reasonably process
18 claims and pay covered losses.

19 *d. The dual subjective and objective nature of the bad-faith tort.* To make out a prima facie
20 case of first-party bad faith, the plaintiff-insured must prove both that there was no reasonable basis
21 for the defendant-insurer’s claims processing and that, in its claims-processing conduct, the
22 defendant-insurer knew or acted in reckless disregard of the lack of reasonable basis. Thus, the first
23 element focuses on whether the insurer’s challenged conduct was objectively unreasonable. The
24 second element, a subjective one, requires proof that the insurer knew its conduct was unreasonable
25 or acted in reckless disregard of facts or legal authority that revealed ed the unreasonableness.
26 Knowledge, a matter exclusively within the ken of the insurer, will often be proved through
27 circumstantial evidence. Since juridical entities cannot themselves have knowledge, knowledge by
28 an insurer’s employee or agent satisfies this element of the standard for the bad-faith tort.

29 This dual standard, although not always precisely articulated in this fashion by courts,
30 reflects the predominant view and parallels the standard adopted in the Restatement of the Law,
31 Liability Insurance § 49, for third-party insurer bad faith in claims processing.

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1 In adopting this dual objective–subjective standard, courts have recognized both the policy
2 reasons explained in Comment *c* and the countervailing concerns that insurers should not be
3 pressured by the threat of tort damages to pay unmeritorious claims; nor should insurers be deterred
4 from fully investigating and challenging dubious or questionable claims. Neither insureds nor
5 insurers ~~are benefited~~ benefit if insurers pay for claims for which there is no coverage.

6 A few courts formally have adopted different standards than the one in this Section. On the
7 more stringent side of the continuum, some courts require oppressive, dishonest, or malicious
8 conduct along with a subjective state of mind requiring ill will, hatred, or revenge. Yet, in
9 operationalizing that standard, courts tend to take a relatively indulgent view of whether the facts
10 satisfy that standard; few insurers, after all, are motivated by hatred or ill will toward a particular
11 insured, even when engaging in egregious claims-processing practices. ~~Or, on~~ On the more lenient
12 side of the continuum, some courts require only that the insurer’s actions or decisions were
13 objectively unreasonable. The dual standard adopted in this Section charts a middle course between
14 these two alternatives—one that comports with the majority of courts recognizing the bad-faith tort.

15 *e. The various bases for bad-faith claims processing.* Bad faith in claims processing may
16 include: (1) denials of claims for which no reasonable basis exists for the denial; (2) offers of
17 settlement in amounts below the minimum that would be reasonable based on the facts of the claim
18 and the scope of coverage; (3) investigations that take an unreasonably long time ~~or,~~ that are
19 unreasonably onerous or demanding, or that are otherwise unreasonable; (4) imposing conditions
20 on insureds during claims processing that are unreasonable or impossible to fulfill; ~~and/or~~
21 (5) conditioning payment for an uncontested aspect of a claim on the insured agreeing to a global
22 settlement of the claim.

23 *f. Intentional or negligent tort.* Courts and commentators have sought to pigeon-hole the
24 bad-faith claim as either an intentional or negligent tort. In the form adopted in this Section, it is
25 neither exclusively one nor the other; it straddles, and contains elements of, both.

26 The conduct aspect of the bad-faith tort is similar to negligence insofar as it adopts an
27 objective standard based on reasonableness. But, the subjective knowledge element cannot be
28 squared with negligence, as an actor can act negligently without any knowledge of, indeed while
29 remaining oblivious to, the risk and without appreciating that ~~his or her~~ the conduct is unreasonable.
30 Accordingly, the bad-faith tort, recognized here, is not one that sounds neatly in negligence.

1 ~~But~~On the other hand, nor does it resemble an intentional tort. The objective
2 unreasonableness aspect, for one, is not consistent with intentional torts. The subjective knowledge
3 element, meanwhile, does have a passing similarity to the intent requirement of intentional torts in
4 that an insurer, aware of the unreasonable position ~~taken~~it is taking during claims processing,
5 would likely satisfy the “substantial certainty” prong for intent. See Restatement Third, Torts:
6 Liability for Physical and Emotional Harm § 1(b). But the insurer’s recklessness ~~in appreciating~~
7 ~~the unreasonable~~with regard to the unreasonableness of its own conduct ~~of the insurer~~, while
8 reflecting a higher degree of culpability than negligence, is not the equivalent of intentionally
9 causing harm. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 2,
10 Comment *a* (contrasting the serious wrongdoing of recklessness with intentionally causing harm).
11 Courts and commentators should accept this tort for the hybrid that it is rather than laboring to
12 place it into the traditional tort taxonomy.

13 *g.* ~~Facts~~Timing of insurer’s knowledge of facts supporting good faith ~~must be known to the~~
14 ~~insurer at the time the claim is denied~~. An insurer who claims a reasonable basis for denying a
15 claim may, in an action under this Section, rely on any facts uncovered during its investigation as
16 a basis for its denial of the insured’s claim. In defending itself against a claim of bad faith for
17 denying coverage, an insurer may not rely on facts of which it became aware only after its denial
18 of the claim.

19 Comment *g* applies only when a claim is denied. When an insurer is subject to liability for
20 different claims-handling practices (such as unreasonably delaying payment—or any of the other
21 bases for liability described in Comment *e*), Comment *g* has no effect.

22 *h. Factual cause and scope of liability.* An insurer may act in an egregiously culpable
23 manner but not cause any harm to its insured, just as *any* tortfeasor may act in an egregiously
24 culpable manner but, due to fortuity, not inflict injury. In either instance, the same factual cause
25 rules applicable to other torts apply to bad-faith claims—and pursuant to these rules, ~~in the bad-~~
26 ~~faith context~~, an insurer is ~~only~~ liable only if its misconduct actually causes harm. See Restatement
27 Third, Torts: Liability for Physical and Emotional Harm §§ 26-28. Thus, an insurer who fails
28 reasonably to investigate a claim because of a cynical policy to reduce administrative costs is not
29 liable under this Section if the claim is for an uncovered loss; nor is the insurer liable if the insurer
30 cynically denies a claim ~~is one~~ for which there is, in fact, a justifiable basis ~~exists~~ for denial.
31 However, an insurer who engages in dilatory claims investigation and processing may be liable

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1 for any harm caused by the delay in payment or for other harm that the deficient claims processing
 2 caused. Simply, if the insurer harms the insured, the insurer may be subject to liability under this
 3 Section; if the insurer causes no harm to the insured, the insurer is not liable under this Section, no
 4 matter how egregious its conduct.

5 ~~An~~Even if an insurer’s outrageous, dilatory, or otherwise unreasonable conduct ~~that~~ does
 6 not ~~constitute~~give rise to bad-faith~~bad-faith~~ tort liability because it fails to meet the factual cause
 7 requirement of paragraph (3), the insurer nevertheless may be liable for negligent or intentional
 8 infliction of emotional distress if the requirements for one of those torts are satisfied. See Comment
 9 j; Restatement Third, Torts: Liability for Physical and Emotional Harm §§ 46 and 47.

10 **Illustration:**

11 1. Lana’s home was badly burned under mildly suspicious circumstances. Pursuant
 12 to a policy aggressively to pursue possible fraud, County Farm, Lana’s insurer, conducted
 13 a biased and unreasonable investigation that sought only to find evidence of fraud by Lana
 14 but that was completed in timely fashion. At the conclusion of the investigation, County
 15 Farm did uncover evidence that created a genuine issue about the merits of the claim (and
 16 that could have been found in a proper investigation), although Lana was successful in the
 17 trial of her claim for insurance claimcoverage. County Farm is not liable to Lana for bad
 18 faith because its biased investigation did not cause Lana harm; even a reasonable
 19 investigation would have led to the same insurer decision. Because there was a reasonable
 20 basis for denying the claim, Lana cannot recover under this Section for County Farm’s
 21 unreasonable claims-investigations practice, because that practice caused no harm.

22 In addition to factual cause, the harm suffered by the insured must be within the insurer’s
 23 scope of liability. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 29.
 24 Sometimes referred to as proximate cause or legal cause, the Liability for Physical and Emotional
 25 Harm Restatement employed the new “scope of liability” terminology because it better describes
 26 the function of this element of a case and because proximate cause is often used to mean something
 27 different from this element. See *id.* Special Note on Proximate Cause.

28 **Illustration:**

29 2. Alan’s home becomes uninhabitable because of storm damage, and he submits a
 30 claim for the loss to his insurer, Habitable Home Insurance. Habitable delays paying the
 31 money it owes Alan, even though it knows that there is no basis for its delay. During this

1 time, Alan uses money he had set aside for a vacation in Rio de Janeiro to repair his home.
2 When Habitable still has not paid the claim as the date for his vacation approaches, Alan
3 changes the location for his vacation to a more economical place, St. Louis. While in St.
4 Louis, Alan is ~~mugged~~the victim of a mugging, during which ~~he has~~ his luxury watch is
5 stolen. Habitable’s delay in claims processing satisfies the standard for bad faith in
6 paragraphs (1) and (2) and is ~~as well~~also a factual cause of the loss of jewelry (per
7 paragraph (3)). But it is not liable for the watch’s ~~theft~~loss because (also per paragraph (3))
8 the loss of the watch is not within the scope of Habitable’s liability; theft of a watch is, as
9 a matter of law, not among the risks created by bad-faith delays in claims processing.

10 *i. Obligation reasonably to investigate.* As Comment *fe* makes plain, an insurer’s obligation
11 of good faith and fair dealing is not limited to the claims decision it ultimately makes. An insurer
12 must act reasonably in investigating a claim when there are factual or legal matters that must be
13 resolved. An insurer acting reasonably will: engage in a prompt investigation that does not
14 unreasonably delay resolution of the coverage issue; hire independent and unbiased experts when
15 expertise is required to determine relevant facts; and even-handedly seek and give due regard to
16 all of the facts bearing on the coverage issue (although, in so doing, an insurer is entitled to consider
17 the fact that insureds do not have a concomitant obligation of even-handedness in filing and
18 supporting their claims). Beyond that, a reasonable insurer will: respond appropriately when
19 additional material facts are provided after an initial denial of a claim; resolve any legal issues
20 bearing on the legitimacy of the claim without bias favoring itself; and consider all possible bases
21 for coverage and not truncate inquiry when one basis for ~~denial exists~~coverage is not established
22 if there are other provisions that might provide coverage.

23 Insurers engaging in bad-faith investigations are subject to liability for harm caused by the
24 insurer’s breach of the duty of good faith and fair dealing, which includes the obligation to act
25 reasonably in claims investigations. See Comment *e*.

26 **Illustration:**

27 3. Laura, who has a homeowner’s insurance policy with Jackson Insurance Co.,
28 discovers that a window had fallen out of the wall of her living room, and the floor in one
29 part of the living room gave way in her 100-year-old house. Laura hired an investigator
30 who reports that a fungus was responsible for the condition that led to the mishaps and that
31 her home was at risk of imminent collapse. Laura’s claim to Jackson is denied based on an

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1 exclusion for any damage caused by “wet or dry rot,” a reasonable determination by
2 Jackson. Jackson, aware of the possibility of other bases for coverage, however, does not
3 investigate or consider whether the damage was covered by an “additional coverage”
4 section of her policy that provides coverage for “an actual collapse” that was “due to
5 decay.” Jackson is subject to liability for bad faith based on its failure to investigate whether
6 coverage exists under the additional coverage section of the policy.

7 *j. Other tortious conduct by an insurer.* Before the bad-faith tort claim became well
8 recognized, a number of courts permitted insureds to recover extra-contractual damages from
9 insurers based on the tort of intentional infliction of emotional distress. The significance of
10 intentional infliction of emotional distress as a remedy for insurer misconduct has declined with the
11 advent of the bad-faith tort because the hurdles to recovery for intentional infliction are generally
12 more stringent, requiring not only intentional or reckless conduct in interfering with [the insured's](#)
13 emotional tranquility, but also extreme and outrageous behavior and a showing that the victim
14 suffers severe emotional harm. See Restatement Third, Torts: Liability for Physical and Emotional
15 Harm § 46. However, this claim remains available when circumstances warrant, including on those
16 occasions when coverage is fairly debatable, [so that denial was not unreasonable](#), but the insurer
17 engages in extreme and outrageous conduct in investigating the claim.

18 Besides intentional infliction of emotional distress, an insurer’s conduct in investigating
19 and processing a claim may constitute another tort, such as defamation or negligent infliction of
20 emotional distress. For defamation, see Restatement Third, Torts: Defamation and Privacy § ___
21 (forthcoming). For negligent infliction of emotional distress, see Restatement Third, Torts:
22 Liability for Physical and Emotional Harm § 47. If the elements of another tort are established, the
23 insurer is liable for that tort. In other words, the availability of a bad-faith claim does not preempt
24 other torts that the insurer may commit in its claims-processing conduct.

25 *k. Fiduciary duty.* An insurer does not have a fiduciary duty to its insured in its processing
26 of first-party insurance claims; the insurer is not required to take the insured’s interests as primary
27 over the insurer’s. But, nor is the insurer in the opposite position; it cannot prioritize its own
28 interests over the interests of the insured. The insurer must, in other words, act in a way that gives
29 equal weight to its and its insured’s often divergent interests. The insurer must act in a way that
30 recognizes the insured’s interest in recovering for legitimately covered losses and the insurer’s co-
31 equal interest in avoiding paying uncovered claims. Or, to put the point in slightly different terms,

1 the insurer must act as a neutral decisionmaker in resolving whether ~~a genuine dispute exists about~~
2 ~~whether~~ coverage exists. The bad-faith claim recognized in this Section provides fully adequate
3 remedies without the need to resort to ~~breach of the fiduciary duty~~ fiduciary-duty obligation. See
4 Restatement Third, Torts: Liability for Economic Harm § 16, Comment *b*.

5 *l. Judge and jury.* Both the objective and subjective elements of the bad-faith tort are
6 generally mixed questions of law and fact ~~that reserved for~~ the factfinder ~~must resolve~~. There are
7 two exceptions, however. First, when the question that must be assessed is whether the insurer’s
8 denial of coverage was reasonable based on the policy or statutory language—and that inquiry
9 turns on the interpretation of specific policy or statutory language—courts should assess whether
10 the insurer acted reasonably as a matter of law. Addressing that limited matter as a legal one is
11 consistent with the rule that interpretation of insurance policy or statutory language is a matter for
12 the court because a legally trained official is better able to make that determination than a lay
13 adjudicator.

14 **Illustrations:**

15 4. Same facts as Illustration 3, involving the falling-down house, except that
16 Laura’s home suffers a total collapse. Controlling precedent in the jurisdiction provides
17 that damage due to fungus constitutes “decay.” Laura makes a claim for \$190,000, the
18 policy limits. Jackson does not respond to her claim for 100 days—and when it finally does
19 respond, it offers her \$97,500. In so doing, it provides no reason for the discounted sum,
20 and it refuses to negotiate with Laura. Whether there was a reasonable basis for Jackson’s
21 claims-processing behavior is a matter for the jury.

22 5. Same facts as Illustration 3, except that there is no “additional coverage” section
23 of the policy so that the issue on whether the insurer had a reasonable basis for denying
24 coverage turns on the interpretation of “wet or dry rot” in the policy. That determination is
25 a legal one and consequently one for the court to decide.

26 Second, in instances in which the plaintiff claims bad faith based only on the insurer’s
27 denial of coverage and the facts bearing on whether coverage exists are not in dispute, the question
28 of whether the insurer had a reasonable basis for denying coverage is a legal one for the court.

29 *m. State unfair-insurance-claims-practices provisions.* Virtually all states have enacted
30 statutory provisions prohibiting specified unfair ~~insurer~~ claims practices, although, in most states,
31 the statutes are not enforceable through private rights of action. However, in common-law bad-faith

1 claims, courts may use the insurer’s violation of such provisions as the basis for finding a lack of
2 reasonable basis in the insurer’s claims processing in a manner analogous to the doctrine of
3 negligence per se. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 14.

4 *n. Negligence and honest mistakes.* As paragraph (2) and Comments *d* and *e* make plain,
5 insurers’ ordinary negligence or insurers’ good-faith mistakes are not an adequate basis for bad-
6 faith tort liability. Before liability is imposed under this Section, there must be unreasonable
7 conduct by the insurer in its claims processing *and* awareness or reckless disregard of that
8 unreasonable conduct in denying the insured the benefits of proper performance. Numerous courts
9 have expressed concern that the bad-faith tort might impose liability on every insurer who makes
10 an innocent but incorrect judgment about the validity of a claim. Incorrect judgments, however,
11 are insufficient to satisfy this Section. The incorrect judgment must be both one that a reasonable
12 insurer would not make, *and* the insurer must know that its conduct lacks a reasonable basis or act
13 ~~recklessly~~ in ~~remaining ignorant~~ reckless disregard of the lack of reasonable basis in the claims-
14 processing process.

15 Often, the effort to cordon off routine erroneous determinations by insurers is reflected in
16 courts’ insistence that bad faith is an “intentional tort.” Such a characterization is misleading, as
17 explained in Comment *f*.

18 **Illustrations:**

19 64. Same facts as Illustration 3, regarding the ~~falling window~~ falling-down house,
20 except that there is no additional coverage section in Laura’s policy. Jackson’s denial of
21 Laura’s claim under the standard policy provisions that excludes damage due to wet or dry
22 rot, while determined to be incorrect by the court because that language was ambiguous in
23 its application to fungus, is reasonable or, alternatively, fairly debatable. Jackson is not
24 liable to Laura for bad faith in its denial of her claim.

25 75. Same facts as ~~Illustration~~ Illustration 3, except that Laura’s home suffers a total
26 collapse. Laura makes a claim for \$190,000, the policy limits. Jackson does not respond to
27 her claim for 100 days (despite an insurance regulation requiring responses within 60
28 days)—and when it finally does respond, it offers her \$97,500. In so doing, it provides no
29 reason for the discounted sum, and it refuses to negotiate with Laura who Jackson knows
30 has become homeless, owing to her home’s destruction. Jackson is subject to liability to
31 Laura for its bad-faith claims processing.

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1 *o. Damages.* A plaintiff who prevails in a bad-faith insurance claim is entitled to the benefit
 2 of the insurance coverage, if not otherwise recovered in a contract claim, as well as consequential
 3 damages. Thus, contrary to the general contract-law rule, a prevailing bad-faith plaintiff is entitled
 4 to recovery for all consequential economic losses and emotional harm that are within the insurer’s
 5 scope of liability (proximate cause). See [Comment h](#); Restatement Third, ~~of~~ Torts: Liability for
 6 Physical and Emotional Harm § 29 (discussing scope of liability). Family members who suffer lost
 7 consortium due to emotional harm to an insured family member may recover damages for
 8 emotional harm. See *id.* §§ 48 A and 48 C (in Restatement Third, Torts: Concluding Provisions
 9 (now known as Restatement Third, Torts: Miscellaneous Provisions) (Tentative Draft No. 1,
 10 2022)). Notwithstanding the American rule that each party generally bears its own attorneys’ fees,
 11 an insured may also be entitled to recover reasonable attorneys’ fees incurred in establishing that
 12 coverage exists but not the fees required to establish bad faith. In addition, if an insurer’s conduct
 13 is sufficiently culpable to meet the jurisdiction’s standard for punitive damages, those damages
 14 may be recovered as well.

REPORTERS’ NOTE

15 *Comment a. History, terminology, [scope](#), and cross-reference.* The *Gruenberg* case, the
 16 first to recognize a tort claim against a first-party insurer, relied on prior third-party cases requiring
 17 insurers to act reasonably in negotiating a settlement when there was a risk of a judgment in excess
 18 of the insurer’s coverage. *Gruenberg v. Aetna Ins. Co.*, 510 P.2d 1032, 1036-1038 (Cal. 1973). In
 19 both *Gruenberg* and its third-party predecessors, the California Supreme Court relied on the
 20 implied covenant of good faith and fair dealing contained in all contracts. A number of other courts
 21 followed this same pattern of recognizing first-party claims based on third-party insurance
 22 precedent regarding settlement practices. See, e.g., *Chavers v. Nat’l Sec. Fire & Cas. Co.*, 405 So.
 23 2d 1, 5 (Ala. 1981); *Hoskins v. Aetna Life Ins. Co.*, 452 N.E.2d 1315, 1319 (Ohio 1983); Roger
 24 C. Henderson, *The Tort of Bad Faith in First-Party Insurance Transactions: Refining the Standard*
 25 *of Culpability and Reformulating the Remedies by Statute*, 26 U. MICH. J.L. REFORM 1, 16 (1992)
 26 (“The origins of the tort of bad faith in first-party insurance cases are to be found in third-party
 27 insurance contracts, that is, liability insurance.”).

28 Today, the vast majority of states permit recovery of extra-contractual damages either
 29 through a bad-faith tort claim, a statutory claim (discussed in more detail in the Reporters’ Note to
 30 Comment *o*), or by permitting extra-contractual damages in a breach-of-contract claim against the
 31 insurer. See STEPHEN S. ASHLEY, *BAD FAITH ACTIONS LIABILITY & DAMAGES* § 2:15 (2019
 32 update) (cataloguing states’ approaches and reporting that a majority of states recognize claims for
 33 bad faith or otherwise permit extra-contractual damages, while identifying 13 states that do not
 34 and three that have not addressed the matter); DAN B. DOBBS ~~ET AL.~~ [ET AL.](#), *THE LAW OF TORTS*

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1 § 702 (2d ed. 2016 & Supp.) (explaining that “most courts” have adopted first-party bad faith or
2 equivalent provisions permitting recovery of extra-contractual damages).

3 *Comment c. The special nature of insurance contracts.* For cases endorsing the various
4 aspects of insurance contracts that make them exceptional, see:

5 1) *Vast disparity of bargaining power; contracts of adhesion.* Healy Tibbitts
6 Constr. Co. v. Employers’ Surplus Lines Ins. Co., 140 Cal. Rptr. 375, 379 (Ct. App. 1977)
7 (observing that “insurance contracts are regarded as contracts of adhesion expressing the
8 superior bargaining power of the insurer”); White v. Unigard Mut. Ins. Co., 730 P.2d 1014,
9 1019 (Idaho 1986) (adopting first-party bad faith while observing “[i]t is in fact these
10 ‘adhesionary aspects’ of the insurance contract which have prompted this court in the past
11 to come to the aid of the insured”); Eagle Star Ins. Co. v. Int’l Proteins Corp., 360 N.Y.S.2d
12 648, 650 (App. Div. 1974) (“Contracts of insurance have been referred to as ‘Contracts of
13 Adhesion’ in view of the disadvantageous bargaining position which generally exists
14 between the parties and, under such circumstances, are narrowly construed against the
15 insurer” (citation omitted)), aff’d, 346 N.E.2d 249 (N.Y. 1976); Skaling v. Aetna Ins. Co.,
16 799 A.2d 997, 1003 (R.I. 2002) (acknowledging that the court’s adoption of the bad-faith
17 tort was “[i]n ^{the} recognition of the imbalance in the bargaining positions of the parties to an
18 insurance contract”).

19 2) *Public nature of insurance.* Findley v. Time Ins. Co., 573 S.W.2d 908, 910 (Ark.
20 1978) (observing that “insurance companies, like common carriers and utilities, are
21 regulated and clearly affected with a public interest”); Egan v. Mut. of Omaha Ins. Co.,
22 620 P.2d 141, 146 (Cal. 1979) (explaining the insurance industry as providing a “vital
23 service labeled quasi-public in nature”); Best Place, Inc. v. Penn Am. Ins. Co., 920 P.2d
24 334, 339-340 (Haw. 1996), as amended (June 21, 1996) (observing that numerous laws
25 regulating the insurance industry reveal the legislature “has recognized that the insurance
26 industry affects the public interest”); William M. Goodman & Thomas Greenfield Seaton,
27 *Foreword: Ripe for Decision, Internal Workings and Current Concerns of the California*
28 *Supreme Court*, 62 CAL. L. REV. 309, 346 (1974) (observing that “insurers’ obligations are
29 also rooted in their status as purveyors of a vital service labeled quasi-public in nature”);
30 Jay M. Feinman, *The Insurance Relationship As Relational Contract and the “Fairly*
31 *Debatable” Rule for First-Party Bad Faith*, 46 SAN DIEGO L. REV. 553, 557 (2009)
32 (recognizing that “the single insurance contract is an instance of a system of insurance on
33 which policyholders, dependents, tort victims, and society at large depend to provide
34 security in the event of harm”).

35 3) *Risk transfer and distribution.* See Roger C. Henderson, *The Tort of Bad Faith*
36 *in First-Party Insurance Transactions: Refining the Standard of Culpability and*
37 *Reformulating the Remedies by Statute*, 26 U. MICH. J.L. REFORM 1, 8-10 (1992) (detailing
38 the important work of risk transfer for economic development).

39 4) *Reliance and reasonable expectations of the insured.* Noble v. Nat’l Am. Life
40 Ins. Co., 624 P.2d 866, 867 (Ariz. 1981) (recognizing the special nature of insurance

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1 contracts and reciting the role of “securing the reasonable expectations” of insureds for
2 special treatment of those contracts); *Crisci v. Sec. Ins. Co.*, 426 P.2d 173, 179 (Cal. 1967)
3 (noting that, “among the considerations in purchasing liability insurance, as insurers are
4 well aware, is the peace of mind and security it will provide in the event of an accidental
5 loss”).

6 5) *Economic fragility of insureds*. See *Noble*, 624 P.2d at 868 (“Often the insured
7 is in an especially vulnerable economic position when such a casualty loss occurs.”); *Best*
8 *Place, Inc.*, 920 P.2d at 344 (explaining that the insured “seeks protection and security from
9 economic catastrophe”); *Hoskins v. Aetna Life Ins. Co.*, 452 N.E.2d 1315, 1319 (Ohio
10 1983) (recognizing that the insured “may be in dire financial straits and therefore may be
11 especially vulnerable to oppressive tactics by an insurer seeking a settlement or a release”);
12 *Arnold v. Nat’l Cnty. Mut. Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex. 1987) (adverting to
13 unscrupulous insurers taking advantage of “insured’s misfortunes”); WILLIAM T. BARKER
14 & RONALD D. KENT, *NEW APPLEMAN INSURANCE BAD FAITH LITIGATION* § 5.02[1], at
15 5-4.1 (2d ed. 2019) (“[R]isks which are insured are normally ones which an insured cannot
16 afford to bear without insurance, so the occurrence of such a loss exerts pressure on an
17 insured to obtain a prompt settlement, even if that may mean foregoing full
18 compensation . . .”).

19 6) *Lack of adequate incentives, absent tort liability*. *DiSalvatore v. Aetna Cas. &*
20 *Sur. Co.*, 624 F. Supp. 541, 543 (D.N.J. 1986) (“Recognition of an action permitting an
21 insured to recover damages in excess of the actual amount owed under the contract would
22 provide an effective means of countering the existing incentives for an insurance company
23 to wrongfully delay or deny payment.”); *Best Place, Inc.*, 920 P.2d at 346 (“Without the
24 threat of a tort action, insurance companies have little incentive to promptly pay proceeds
25 rightfully due to their insureds, as they stand to lose very little by delaying payment.”);
26 *Curry v. Fireman’s Fund Ins. Co.*, 784 S.W.2d 176, 178 (Ky. 1989) (expressing concern
27 that, without the availability of a bad-faith claim, the insurer could “delay payment by
28 litigation with no greater possible detriment than payment of the amount justly owed plus
29 interest”); *Skaling v. Aetna Ins. Co.*, 799 A.2d 997, 1003 (R.I. 2002) (observing that
30 “limiting an insured to recovery of the policy limits for a breach of the insurance contract,
31 without the threat of punitive damages or awards in excess of the policy limits, would do
32 little to promote the prompt payment of claims or to prevent an unscrupulous insurer from
33 refusing payment or delaying settlement of legitimate claims”); *Arnold*, 725 S.W.2d at 167
34 (noting that “insurers can arbitrarily deny coverage and delay payment of a claim with no
35 more penalty than interest on the amount owed”); Kenneth S. Abraham, *The Natural*
36 *History of the Insurer’s Liability for Bad Faith*, 72 TEX. L. REV. 1295, 1309 (1994)
37 (explaining the effect of bad-faith liability on insurer incentives to engage in dilatory and
38 other unfair claims practices); Phyllis Savage, *The Availability of Excess Damages for*
39 *Wrongful Refusal to Honor First Party Insurance Claims—An Emerging Trend*, 45
40 *FORDHAM L. REV.* 164, 169 (1976) (“Because [the contract measure of damages] so

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1 severely restricts the maximum available recovery, it is in the insurer’s best interest to
2 delay payment as long as possible.”).

3 For further discussion of why the insurer’s bad-faith breach of an insurance contract is
4 properly subject to special treatment, see *Cary v. United of Omaha Life Ins. Co.*, 68 P.3d 462, 466
5 (Colo. 2003), as modified on denial of reh’g (May 19, 2003) (observing that “insurance contracts
6 are not ordinary commercial contracts”); *Dolan v. Aid Ins. Co.*, 431 N.W.2d 790, 791-792 (Iowa
7 1988) (cataloguing reasons for recognizing bad-faith claims); BARKER & KENT, *supra* § 1.05[1], at
8 1-20; Jay M. Feinman, *The Insurance Relationship As Relational Contract and the “Fairly*
9 *Debatable” Rule for First-Party Bad Faith*, 46 SAN DIEGO L. REV. 553, 557-559 (2009) (outlining
10 other distinct aspects of insurance contracts).

11 *Comment d. The dual subjective and objective nature of the bad-faith tort.* The Wisconsin
12 Supreme Court, in *Anderson v. Continental Ins. Co.*, 271 N.W.2d 368 (Wis. 1978), set forth the
13 two-part standard for bad faith that has influenced many other courts adopting bad-faith claims
14 and on which the black letter of this Section” is based:

15 To show a claim for bad faith, a plaintiff must show the absence of a
16 reasonable basis for denying benefits of the policy and the defendant’s knowledge
17 or reckless disregard of the lack of a reasonable basis for denying the claim. . . .

18 . . .

19 The tort of bad faith can be alleged only if the facts pleaded would, on the
20 basis of an objective standard, show the absence of a reasonable basis for denying
21 the claim, i.e., would a reasonable insurer under the circumstances have denied or
22 delayed payment of the claim under the facts and circumstances.

23 *Id.* at 376-378; see also *Noble v. Nat’l Am. Life Ins. Co.*, 624 P.2d 866, 868 (Ariz. 1981) (adopting
24 the *Anderson* standards); *Braesch v. Union Ins. Co.*, 464 N.W.2d 769, 778 (Neb. 1991) (“We
25 conclude that the *Anderson* standard of care strikes a proper balance between the respective rights
26 of the insurer and the policyholder.”); *McCullough v. Golden Rule Ins. Co.*, 789 P.2d 855, 855
27 (Wyo. 1990) (“[W]e adopt . . . the ‘fairly debatable’ objective standard care analysis of
28 *Anderson* . . . for any award of extra-contractual damages.”); 1 WILLIAM T. BARKER & RONALD D.
29 KENT, *NEW APPLEMAN INSURANCE BAD FAITH LITIGATION* § 5.03[2] (2d ed. 2019) (“The *Anderson*
30 standard has been adopted by most courts recognizing expanded recovery for bad faith and by the
31 Restatement of the Law of Liability Insurance.”); Jay M. Feinman, *The Insurance Relationship As*
32 *Relational Contract and the “Fairly Debatable” Rule for First-Party Bad Faith*, 46 SAN DIEGO L.
33 REV. 553, 561 (2009) (characterizing *Anderson* as “[p]erhaps the most widely cited formulation”
34 of the standard for bad faith); accord Douglas R. Richmond, *Bad Insurance Bad Faith Law*, 39
35 TORT TRIAL & INS. PRAC. L.J. 1, 5-6 (2003) (“An insured charging first-party bad faith generally
36 must establish (1) that the insurer’s conduct was unreasonable and (2) that the insurer knew or
37 reasonably should have known that it was being unreasonable in its handling or payment of the
38 claim at issue. This two-part test applies no matter what type of first-party coverage is in dispute.”).

39 Sometimes the objective element is expressed by courts as a claims decision that is not
“fairly debatable,” the equivalent of ~~the~~a lack of a reasonable basis for the insurer’s claim decision.

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1 As the *Anderson* court stated in its seminal decision, “when a claim is ‘fairly debatable,’ the insurer
2 is entitled to debate it, whether the debate concerns a matter of fact or law.” *Anderson*, 271 N.W.2d
3 at 376. Given their equivalence, courts may choose as a matter of custom and style whether to
4 employ “fairly debatable” or “reasonable basis” in jury instructions. It would, however, be
5 redundant to instruct on both “reasonable basis” and “fairly debatable.” See *Noble*, 624 P.2d at
6 868 (treating “fairly debatable” and denials without a “reasonable basis” as equivalent antonyms).

7 The existence of a fairly debatable question about a claim should not be understood or
8 treated as an affirmative defense. Because saying a claim is “fairly debatable” is the equivalent of
9 saying that an insurer had a “reasonable basis” for its denial, it is an element of the plaintiff’s prima
10 facie case for which the plaintiff bears the burden of proof. Thus, an insurer who seeks to prove that
11 a claim was fairly debatable is seeking to negate the existence of a prima facie element of plaintiff’s
12 claim rather than proving an affirmative defense. See *BARKER & KENT*, supra § 17.05[10][a], at 17-
13 124 (stating that “whether a claim is ‘fairly debatable’ is not really a defense, but is a fundamental
14 aspect of what must be established in order to impose bad faith liability”). Reference to “fairly
15 debatable” as a defense is, unfortunately, common. See, e.g., *Schuessler v. Wolter*, 310 P.3d 151,
16 162 (Colo. Ct. App. 2012) (observing that “the defense of fair debatability is not a threshold
17 inquiry”); *Sanderson v. Am. Fam. Mut. Ins. Co.*, 251 P.3d 1213, 1217 (Colo. Ct. App. 2010) (stating
18 that a showing that the claim was “fairly debatable” is not sufficient to defeat a bad-faith claim).

19 When the bad-faith claim involves a coverage issue and when the insurer ultimately denies
20 coverage, some courts employ the standard for judgment as a matter of law contained in Fed. R.
21 Civ. Pro. 50(a) (or a state-court counterpart) as the standard for whether the insurer had a
22 reasonable basis for denying the insured’s claim. These courts reason that, if the factual record,
23 after appropriate investigation by the insurer, is one requiring jury resolution to determine whether
24 coverage exists, then the insurer *necessarily* had a reasonable basis for denying coverage. An early
25 and explicit such case is *Nat’l Sav. Life Ins. Co. v. Dutton*, 419 So. 2d 1357, 1362 (Ala. 1982).
26 There, the court, acknowledging that the bad-faith tort was at an “embryonic” stage and that the
27 burden on plaintiff to establish a claim was a heavy one, stated that if there was a fact issue with
28 regard to coverage of the insurance claim, the tort claim failed. See also *Blue Cross & Blue Shield*
29 *v. Campbell*, 466 So. 2d 833, 843 (Miss. 1984) (declaring that, “unless the trial judge grants a
30 directed verdict to the insured plaintiff on the contract claim, then, as a matter of law, the insurance
31 carrier has shown a reasonably arguable basis to deny the claim). In other cases, such a standard
32 is only implicit in the reasoning of the court. See *Cont’l Cas. Co. v. Howard*, 775 F.2d 876, 880-
33 881 (7th Cir. 1985) (applying Indiana law) (adverting to the standard of review for a directed
34 verdict and then proceeding to canvas the record to determine if there was a reasonable basis for
35 the insurer to deny the claim).

36 Among those courts adopting the ~~judgment as a matter of law~~judgment-as-a-matter-of-law
37 standard, most do so cautiously, recognizing that there are or may be exceptions. See *Dutton*, 419
38 So. 2d at 1362 (softening its adoption of the ~~judgment as a matter of law~~judgment-as-a-matter-of-
39 law standard by stating that it would be true “[i]n the normal case” and “ordinarily to describe a
40 factual issue for the jury will negate a bad faith claim”); *Campbell*, 466 So. 2d at 843 (adding the

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1 qualifier “in the vast majority of cases”); 2 WILLIAM T. BARKER & RONALD D. KENT, NEW
3 APPLEMAN INSURANCE BAD FAITH LITIGATION § 17.03[4][b], at 17-26-30.1 (2d ed. 2019).
4 Importantly, even if such a “directed verdict” shortcut is adopted, it must be limited to disputes
5 over whether coverage exists; it has no bearing on the reasonableness of an insurer’s investigation,
6 delay, settlement offers, or other claims-processing misconduct.

7 Other courts reject the equivalence of the directed-verdict standard with whether the insurer
8 had a reasonable basis for denying coverage. E.g., *Hillman v. Nationwide Mut. Fire Ins. Co.*, 855
9 P.2d 1321, 1325 (Alaska 1993) (“*Dutton* does not state the Alaska rule of law.”); *Brewer v. Am.*
10 *& Foreign Ins. Co.*, 837 P.2d 236, 238 (Colo. App. 1992) (“We reject defendant’s assertion . . .
11 that, since plaintiff could not, as a matter of law, have properly been awarded a directed verdict on
12 the underlying arson claim, his bad faith claim must, as a matter of law, be denied. . . . The test for
13 an insurer’s duty for good faith and fair dealing with its insured is one of reasonableness under the
14 circumstances.”); *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 62 (Fla. 1995)
15 (rejecting, in its entirety, the directed-verdict standard); *Reuter v. State Farm Mut. Auto. Ins. Co.*,
16 469 N.W.2d 250, 254 (Iowa 1991) (“We do not agree that the mere denial of a plaintiff’s motion
17 for a directed verdict automatically establishes that the issue is ‘fairly debatable.’”); *Farmland Mut.*
18 *Ins. Co. v. Johnson*, 36 S.W.3d 368, 375 (Ky. 2000), as modified (Feb. 22, 2001) (observing that
19 “the existence of jury issues on the contract claim does not preclude the bad faith claim”); *Peterson*
20 *v. W. Nat’l Mut. Ins. Co.*, 946 N.W.2d 903, 911 (Minn. 2020) (rejecting the ~~judgement-as-a-matter~~
21 ~~of-law~~[judgment-as-a-matter-of-law](#) standard and explaining the difference between a judge
22 making that determination and an insurer deciding whether to honor an insurance claim); *Skaling*
23 *v. Aetna Ins. Co.*, 799 A.2d 997, 1003 (R.I. 2002) (overruling prior precedent that adopted the
24 directed-verdict standard and concluding that the directed-verdict standard for proof of reasonable
25 basis “is unworkable and unjust,” while further explaining that a conflict in testimony between
26 insured and insurance adjuster or insurer would require jury determination but should not be
27 dispositive on whether a reasonable basis existed); *Jones v. Farmers Ins. Exch.*, 286 P.3d 301, 304
28 (Utah 2012) (“It is not the law in Utah that, when the insurance company argues a claim was fairly
29 debatable, the case must be resolved by the court as a matter of law.”).

30 Conduct supporting a finding of bad faith can occur in a variety of circumstances. See *Ruwe*
31 *v. Farmers Mut. United Ins. Co.*, 469 N.W.2d 129, 135 (Neb. 1991) (“The tort of bad faith embraces
32 any number of bad faith settlement tactics, such as inadequate investigation, delays in settlement,
33 false accusations, and so forth.”); *Fetch v. Quam*, 623 N.W.2d 357, 361 (N.D. 2001) (“This duty of
34 good faith imposed on an insurer . . . include[s] a duty of fair dealing in paying claims, providing
35 defense to claims, negotiating settlements, and fulfilling all other contractual obligations.”).

36 Behavior supporting a finding of bad faith can take myriad forms, and it can occur at
37 different times throughout the ~~claims-settlement~~[claims-settlement](#) process. Such behavior includes
38 failing reasonably to investigate a claim, making an unreasonably low settlement offer, and
39 insisting on a global settlement of plaintiff’s claim when one aspect of the claim is undisputed.
40 E.g., *Lockwood v. Geico Gen. Ins. Co.*, 323 P.3d 691, 698 (Alaska 2014) (identifying all of the
first three in the list above as potential bases for a jury finding of unreasonable conduct in claims

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1 processing); *Drop Anchor Realty Tr. v. Hartford Fire Ins. Co.*, 496 A.2d 339, 344 (N.H. 1985)
2 (insurer taking “unfair advantage of the plaintiff’s weakened position by making [unjustifiably
3 low] settlement offers . . . to force the plaintiff to accept less than the true value of its compensable
4 losses”). Such behavior also includes failing to consider all of the evidence possessed by the insurer
5 by “cherry picking” evidence only favorable thereto, *Peterson v. W. Nat’l Mut. Ins. Co.*, 946
6 N.W.2d 903, 911 (Minn. 2020), as well as conducting a biased investigation that seeks to find only
7 evidence supporting a denial of coverage, *Zoppo v. Homestead Ins. Co.*, 644 N.E.2d 397, 400
8 (Ohio 1994); 1 WILLIAM T. BARKER & RONALD D. KENT, *NEW APPLEMAN INSURANCE BAD FAITH*
9 *LITIGATION* § 5.04[1][a], at 5-20 (2d ed. 2019) (“Because the insurer must pay the claim if there is
10 coverage, it has a private incentive to find facts that defeat coverage. To assure that the insurer
11 also looks for facts that would support coverage, duties to investigate are imposed . . . by . . . the
12 common law of bad faith.”). It also encompasses drawing conclusions from circumstantial
13 evidence based on mere speculation rather than reasonable inference. E.g., *LeForge v. Nationwide*
14 *Mut. Fire Ins. Co.*, 612 N.E.2d 1318, 1323 (Ohio Ct. App. 1992) (assuming, without evidence, that
15 insured’s current symptoms were caused by preexisting condition rather than accident). And, it
16 encompasses unreasonable delay in investigating a claim that results in late payment of benefits,
17 *Daney v. Haynes*, 630 So. 2d 949 (La. Ct. App. 1993) (violation of statutory claims practices act
18 providing time limits for payment of claims), as well as an unjustified delay in providing the
19 benefits the insured is entitled to, under the insurance agreement, *LeRette v. Am. Med. Sec., Inc.*,
20 705 N.W.2d 41, 49 (Neb. 2005) (“[W]e reject [the insurer’s] argument asserting that its ultimate
21 payment of benefits in this case precluded a judgment in favor of the [insured] on the bad faith
22 claim [asserting unreasonable delay].”).

23 Often, the second subjective element can be proved only by circumstantial evidence
24 because, as with intent in criminal law, unless the defendant admits to having the requisite
25 knowledge or intent, only circumstantial evidence is available. See *Anderson*, 271 N.W.2d at 377
26 (explaining that “knowledge of the lack of a reasonable basis may be inferred and imputed to an
27 insurance company where there is a reckless disregard of a lack of a reasonable basis for denial or
28 a reckless indifference to facts or to proofs submitted by the insured”); *Peterson*, 930 N.W.2d at
29 451 (finding that unreasonable actions by insurer justified the lower court’s [\(acting as finder of](#)
30 [fact\)](#) inference of reckless disregard); *Dhyne v. State Farm Fire & Cas. Co.*, 188 S.W.3d 454, 458
31 (Mo. 2006) (recognizing that circumstantial evidence is sufficient to prove willful refusal to pay
32 claim); *Wadeer v. New Jersey N.J. Mfrs. Ins. Co.*, 110 A.3d 19, 26 (N.J. 2015) (explaining that
33 “knowledge of the lack of a reasonable basis may be inferred and imputed to an insurance company
34 where there is a reckless . . . indifference to facts or to proofs submitted by the insured”).

35 The many courts adopting this dual objective–subjective standard have recognized the
36 tension inherent in, on the one hand, enabling insurers fully to investigate questionable claims and
37 to deny claims that are fairly debatable and, on the other, ensuring that insureds—who are often
38 vulnerable and at the insurer’s mercy—are treated fairly and in good faith. Courts have expressed
39 the view that the dual standard offers the best balance between these competing but important
40 goals. See, e.g., *McCullough v. Golden Rule Ins. Co.*, 789 P.2d 855, 860 (Wyo. 1990) (“The logical

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1 premise of the debatable (or arguable) standard is that if a realistic question of liability does exist,
2 the insurance carrier is entitled to reasonably pursue that debate without exposure to a claim of
3 violation of its duty of good faith and fair dealing.”); see also BARKER & KENT, supra § 5.02[2], at
4 5-6 to 5-9 (explaining that insurers need latitude to investigate and deny claims so as to preserve
5 premiums paid for deserving claims and to avoid increasing premiums to cover fraudulent or
6 unmeritorious claims).

7 Some courts, including the California Supreme Court in the seminal *Gruenberg* case, have
8 adopted a more lenient standard than the one adopted in this Section, imposing liability whenever
9 the insurer acts without reasonable or proper reason in denying or investigating a claim. See
10 *Gruenberg v. Aetna Ins. Co.*, 510 P.2d 1032, 1037 (Cal. 1973) (holding insurer subject to liability
11 when insurer fails “without proper cause, to compensate its insured for a loss covered by the
12 policy”); see also *Seifert v. Farmers Union Mut. Ins. Co.*, 497 N.W.2d 694, 698 (N.D. 1993)
13 (explaining that, when the insurer “fails to deal fairly and in good faith with its insured by refusing,
14 without proper cause, to compensate its insured for a loss covered by the policy, such conduct may
15 give rise to a cause of action in tort for breach of an implied covenant of good faith and fair
16 dealing”) (quoting *Corwin Chrysler–Plymouth, Inc. v. Westchester Fire Ins. Co.*, 279 N.W.2d
17 638, 642 (N.D. 1979)); BARKER & KENT, supra § 5.03[1], at 5-12 (“While the [*Gruenberg*] test is
18 a minority rule, it is followed in a number of other states.”).

19 By contrast with the lenient standard in California, other courts have adopted a more
20 stringent standard, requiring oppressive, dishonest, or malicious conduct and a subjective state of
21 mind requiring ill will, hatred, or revenge. See, e.g., *Rathbun v. Ward*, 866 S.W.2d 403 (Ark.
22 1993). Yet, in operationalizing that standard, courts tend to take a more lenient view of whether
23 that standard is satisfied. See, e.g., *Columbia Nat’l Ins. Co. v. Freeman*, 64 S.W. 3d 720, 723-725
24 (Ark. 2002) (holding that several actions by insurer that might best be characterized as having no
25 reasonable basis were sufficient evidence for the factfinder to find “oppressive conduct carried out
26 with a state of mind characterized by ill will”).

27 In addition, some courts have adopted a stringent standard because they confronted only
28 the narrow question of whether the plaintiff could recover punitive damages. As explained in
29 Comment *o*, recovery of punitive damages in bad-faith claims should be limited to those instances
30 in which the insurer engages in sufficiently culpable conduct to meet the jurisdiction’s ordinary
31 standard for awarding punitive damages. Thus, in *Pirkl v. Nw. Mut. Ins. Ass’n*, 348 N.W.2d 633,
32 636 (Iowa 1984), the Iowa Supreme Court first recognized that a bad-faith claim for punitive
33 damages could be made, but it limited such claims to insurer behavior that was malicious, illegal,
34 or immoral. Later, the court adopted the *Anderson* standard for bad-faith claims, while retaining
35 the *Pirkl* standard for recovery of punitive damages.

36 In some jurisdictions, the bad-faith tort claim is not recognized, but other alternatives
37 provide a functional equivalent. For example, Minnesota has a statute that incorporates the
38 *Anderson* standard for liability and awards statutory damages, including attorney’s fees and, where
39 the insurer’s behavior is sufficiently egregious, punitive damages. See MINN. STAT. ANN.
40 § 604.18; see also FLA. STAT. ANN. § 624.155. Other jurisdictions permit the recovery of extra-

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1 contractual damages in a breach-of-contract case against the insurer. See, e.g., ME. REV. STAT.
 2 ANN. tit. 24-A, § 2436-A; MD. CODE ANN., CTS. & JUD. PROC. § 3-1701; *Jarvis v. Prudential Ins.*
 3 *Co. of Am.*, 48 A.2d 407, 408 (N.H. 1982).

4 *Comment f. Intentional or negligent tort.* Some courts have characterized the bad-faith
 5 claim as an intentional tort without recognizing that all intentional torts, save for the highly
 6 controversial prima facie tort, require an intent to cause a specific harm. See, e.g., *Standard Life*
 7 *Ins. Co. of Indiana v. Veal*, 354 So. 2d 239, 248 (Miss. 1977) (concluding that the “refusal to pay
 8 the legitimate claim in this case was an intentional wrong,” without identifying what harm the
 9 insurer intended); *Hein v. Acuity*, 731 N.W.2d 231, 235 (S.D. 2007) (describing first-party bad-
 10 faith claim as an intentional tort).

11 *Comment g. ~~Facts justifying~~ Timing of insurer’s knowledge of facts supporting good faith*
 12 *~~must be known to the insurer at the time the claim is denied.~~* Insurers may not justify the
 13 reasonableness of their decision to deny a claim based on information that emerges after the denial
 14 of the claim ~~or that was not communicated to the insured at the time of the denial of coverage.~~ See,
 15 e.g., *Skaling v. Aetna Ins. Co.*, 799 A.2d 997, 1014 (R.I. 2002) (facts about insured’s use of alcohol
 16 at the time of the accident were unknown when the claim was denied and cannot be used in defense
 17 of the bad-faith claim); *Walz v. Fireman’s Fund Ins. Co.*, 556 N.W.2d 68, 70 (S.D. 1996) (“The
 18 issue [of bad faith] is determined based upon the facts and law available to Insurer at the time it
 19 made the decision to deny coverage.”).

20 *Comment h. Factual cause and scope of liability.* Consistent with paragraph (3) and
 21 *Comment h*, courts refuse to permit bad-faith recovery when insurers engage in dubious claims
 22 investigating or handling practices but there actually existed a reasonable basis to deny or delay
 23 the claim, although they often fail to identify factual cause as the reason for such denial. See *State*
 24 *Farm Fire & Cas. Co. v. Brechbill*, 144 So. 3d 248, 258 (Ala. 2013) (“The existence of an insurer’s
 25 lawful basis for denying a claim is a sufficient condition for defeating a claim that relies upon the
 26 fifth element of the insurer’s intentional or reckless failure to investigate”); *Waller v. Truck Ins.*
 27 *Exch., Inc.*, 900 P.2d 619, 639 (Cal. 1995), as modified on denial of reh’g (Oct. 26, 1995) (liability
 28 insurance policy) (“It is clear that if there is no *potential* for coverage and, hence, no duty to defend
 29 under the terms of the policy, there can be no action for breach of the implied covenant of good
 30 faith and fair dealing because the covenant is based on the contractual relationship between the
 31 insured and the insurer.”) (emphasis in original).

32 Although not always articulated, the basic ~~tort-law~~tort-law principle that defendant’s
 33 tortious conduct must be a factual cause of legally cognizable harm supports the decisions by these
 34 courts. As Doug Richman put it when discussing an insurer’s conduct in *Rawlings v. Apodaca*,
 35 726 P.2d 565 (Ariz. 1986):

36 To be sure, Farmers’ [the insurer’s] conduct in this instance was offensive.
 37 Farmers’ reprehensible conduct may have been actionable fraud, it might have been
 38 actionable as the intentional infliction of emotional distress or the tort of outrage, it
 39 might have constituted negligent infliction of emotional distress, and it might have
 40 amounted to tortious interference with the Rawlings’ [the plaintiffs’] business

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1 interests. Farmers’ conduct did not constitute bad faith, however, because Farmers
2 did nothing to injure the Rawlings’ rights to receive the policy benefits for which
3 they bargained, which is what the implied duty of good faith and fair dealing
4 protects. Farmers paid the Rawlings the \$10,000 they were owed under their policy.
5 That the Rawlings may not have pleaded tort causes of action other than bad faith
6 does not through some default mechanism transform Farmers’ conduct into
7 something that as a matter of law it was not.

8 Douglas R. Richmond, *Bad Insurance Bad Faith Law*, 39 TORT TRIAL & INS. PRAC. L.J. 1, 10-11
9 (2003). Farmers’ conduct may have been egregious, but that conduct did not cause harm—and so
10 the conduct would not have been actionable under this Section based on paragraph (3).

11 Contrary to the requirement of paragraph (3) of this Section, some courts permit a bad-
12 faith claim when the insurer fails to conduct its investigation as a reasonable insurer would, even
13 though, at the end of the day, the claim is, or properly would be, denied. As the Washington
14 Supreme Court observed in such a case: “[The insurer] would have us adopt the same ‘no harm,
15 no foul’ rule, in which bad faith is not actionable, as a matter of law, when the insured’s policy
16 does not provide coverage for the loss. We decline to do so.” *Coventry Assocs. v. Am. States Ins.*
17 *Co.*, 961 P.2d 933, 937 (Wash. 1998). Actually, the court paid considerable homage to “no harm,
18 no foul,” which reflects the basic proposition of tort law that requires the defendant’s tortious
19 conduct to have caused the harm for which the plaintiff seeks recovery. The court limited damages
20 to the costs of investigation incurred by the insured that were caused by the insurer’s bad-faith
21 investigation, rejecting the insured’s claim that it should obtain coverage by estoppel or a return
22 of a portion of the premium paid by the insured. *Id.* at 940; see also *United Techs. Corp. v. Am.*
23 *Home Assur. Co.*, 118 F. Supp. 2d 181, 189 (D. Conn. 2000) (permitting recovery for “procedural
24 bad faith” without identifying the harm the insured suffered ~~by insured~~ due to the insurer’s bad
25 faith); *Lloyd’s & Inst. of London Underwriting Cos. v. Fulton*, 2 P.3d 1199, 1207-1209 (Alaska
26 2000) (adopting a combination of estoppel and presumption of prejudice in a third-party insurance
27 dispute to provide coverage to insured after a determination that an exclusion in the policy barred
28 coverage); *Safeco Ins. Co. of Am. v. Butler*, 823 P.2d 499, 512 (Wash. 1992) (employing estoppel
29 to provide coverage for third-party insurance claim despite exclusion in policy found applicable to
30 deny coverage). Other courts, while declining to permit recovery for a loss that was not covered
31 by the policy, permit recovery for harm to an insurer’s intangible invasion of an insured’s
32 emotional security in the belief that the insurer will treat the insured’s claim fairly and in good
33 faith, in effect recognizing a claim for dignitary harm in the claims-processing arena. See, e.g.,
34 *Deese v. State Farm Mut. Auto. Ins. Co.*, 838 P.2d 1265, 1269 (Ariz. 1992) (“However, the insured
35 also is entitled to receive the additional security of knowing that she will be dealt with fairly and
36 in good faith.”). This Section declines to follow the lead of these more permissive courts because
37 there is no substantial body of case law supporting any of the disparate efforts to award bad-faith
38 damages and because of the lack of persuasiveness of the supporting rationales.

39 In addition, some courts, including the Alabama Supreme Court, carve a middle path; they
40 permit an inference that coverage existed whenever the insurer fails to conduct a good-faith

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1 investigation. See *State Farm Fire & Cas. Co. v. Slade*, 747 So. 2d 293, 304 (Ala. 1999) (declaring
2 that “the knowledge or reckless disregard of the lack of a legitimate or reasonable basis may be
3 inferred and imputed to an insurance company when there is a reckless indifference to facts or to
4 proof submitted by the insured”). The effect of this inference is to permit the factfinder to decide
5 there was no reasonable basis for denying coverage. The insurer is, of course, free to overcome
6 this inference, by proving that there was no coverage for the claim or that there was reasonable
7 doubt about the existence of coverage.

8 Illustration 1, involving possible arson, is based loosely on *Guebara v. Allstate Ins. Co.*,
9 237 F.3d 987, 993 (9th Cir. 2001) (applying California law). There, the issue was whether a
10 genuine coverage dispute precluded a bad-faith claim.

11 *Comment i. Obligation to investigate.* Numerous cases address instances in which insurers
12 failed to conduct a reasonable investigation into facts relevant to whether coverage exists. In
13 addition to cases and sources cited in the Reporters’ Note to *Comment d*, see *Egan v. Mut. of*
14 *Omaha Ins. Co.*, 620 P.2d 141, 145 (Cal. 1979) (“To protect [the insured’s legitimate] interests it
15 is essential that an insurer fully inquire into possible bases that might support the insured’s
16 claim.”); *Jordan v. Allstate Ins. Co.*, 56 Cal. Rptr. 3d 312, 321 (Cal. Ct. App. 2007), as modified
17 on denial of reh’g (Apr. 20, 2007) (finding that, although insurer reasonably determined that
18 exclusion in policy prevented coverage, insurer breached its good-faith duty by failing to consider
19 whether coverage existed under an “additional coverage” provision); *Hatch v. State Farm Fire &*
20 *Cas. Co.*, 842 P.2d 1089, 1098 (Wyo. 1992) (holding that the insurer’s investigation of a fire that
21 destroyed the insured’s home, in which the insurer required the insured to provide a 275-page
22 inventory of items in the house, including listing the number of cornflakes remaining in cereal
23 container and specifying the amount of salt left in a salt shaker could be found to have engaged in
24 bad-faith investigation of claim); see generally 1 WILLIAM T. BARKER & RONALD D. KENT, *NEW*
25 *APPLEMAN INSURANCE BAD FAITH LITIGATION* § 5.04, at 5-20 to 5-47 (2d ed. 2019).

26 Consistent with *Comment i*, the basic principle applicable to insurers’ investigations is that
27 insurers should regard the interest in avoiding incorrectly denying coverage as equal to the interest
28 in avoiding incorrectly providing coverage. See *Rawlings v. Apodaca*, 726 P.2d 565, 572 (Ariz.
29 1986) (recognizing insurer’s “obligation to give equal consideration to the insured’s interests”);
30 *Silberg v. California Life Ins. Co.*, 521 P.2d 1103, 1109 (Cal. 1974) (observing that, to satisfy its
31 duty of good faith and fair dealing, an “insurer is obligated to give the interests of the insured at
32 least as much consideration as it gives to its own interests”); *Foster v. Stonebridge Life Ins. Co.*,
33 291 P.3d 105 (Kan. Ct. App. 2012) (declaring that “the insurer has a duty to diligently search for
34 evidence which supports insured’s claim and not merely seek evidence upholding its own
35 interests”) (quoting 14 *COUCH ON INSURANCE* § 207:25, at 207-241 (3d ed. 2005)).

36 Illustration 2, involving the possibility of additional coverage, is loosely based on *Jordan*
37 *v. Allstate Ins. Co.*, 56 Cal. Rptr. 3d 312, 321 (Cal. Ct. App. 2007), as modified on denial of reh’g
38 (Apr. 20, 2007).

39 *Comment j. Other tortious conduct by an insurer.* The Restatement Third of Torts: Liability
40 for Physical and Emotional Harm § 46 contains the elements of the intentional

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1 ~~infliction~~intentional-infliction tort. It provides: “An actor who by extreme and outrageous conduct
2 intentionally or recklessly causes severe emotional harm to another is subject to liability for that
3 emotional harm and, if the emotional harm causes bodily harm, also for the bodily harm.”
4 Consistent with Comment *j*, it is well established that seriously deficient ~~claims-handling~~claims-
5 handling practices can give rise to a claim for the intentional infliction of emotional distress. See
6 *Eckenrode v. Life of Am. Ins. Co.*, 470 F.2d 1, 5 (7th Cir. 1972) (applying Illinois law) (holding
7 plaintiff’s allegations of insurer’s refusal to pay ~~life insurance~~life-insurance benefits stated a claim
8 for intentional infliction of emotional distress); *Fletcher v. W. Nat’l Life Ins. Co.*, 89 Cal. Rptr. 78
9 (Ct. App. 1970) (permitting recovery on an ~~intentional infliction of emotional distress~~intentional-
10 infliction-of-emotional-distress standard). For discussion of the standards for liability under the
11 ~~intentional infliction~~intentional-infliction tort, see generally 1 WILLIAM T. BARKER & RONALD D.
12 KENT, *NEW APPLEMAN INSURANCE BAD FAITH LITIGATION* § 1.05[3][c], at 1-26 (2d ed. 2019).

13 The court in *Hatch v. State Farm Fire & Cas. Co.*, 842 P.2d 1089, 1099 (Wyo. 1992), put
14 it well in a case in which the insurer had not engaged in bad faith but had processed the claim in a
15 culpable manner:

16 Even though the insurer here had a “fairly debatable” reason for not paying
17 the claim in the first place, i.e., its belief that the loss was the result of arson, it
18 cannot properly go beyond a reasonable denial of the claim and engage in
19 unreasonable or unfair behavior to gain an unfair advantage. A “fairly debatable”
20 reason to deny a claim is not a defense against torts that may flow from engaging
21 in oppressive and intimidating claim practices.

22 The court detailed the abusive investigation conducted by the insurer:

23 Appellants were required to file an extremely detailed inventory of items that were
24 in the house at the time of the fire, consisting of 275 pages. For example, they were
25 told that they must list how many cornflakes were left in the cereal box before the
26 fire, and how much salt was in the salt shaker. Appellants were threatened by State
27 Farm representatives with the cooperation provision in the policy unless they did
28 everything they were told. Appellants were required to make unreasonable reports,
29 statements and inventories, even after State Farm had decided to reject their claim.

30 State Farm took over the Hatch house, ousted the Hatch family from
31 possession, and searched the house from top to bottom. State Farm conducted
32 several unsupervised searches of the home and entered the home without
33 permission. State Farm would not allow appellants to have free access to their house
34 for eight days after the fire (August 4–12). A State Farm representative told Mrs.
35 Hatch that all they would ever receive for their belongings was the same price they
36 could get for each item at a garage sale. Hatches were given an unrealistic deadline
37 in which to file this inventory. A team of five State Farm representatives
38 interviewed Mrs. Hatch four different times. One interview lasted five hours with
39 no break for lunch. Mrs. Hatch characterized the State Farm representatives as rude,

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1 abrupt, sarcastic, unprofessional, and hostile. Additionally, the sworn statements of
2 the Hatch's twin boys, ten years old, were taken.

3 On August 12, 1987, Mr. Hatch was told the investigation was complete;
4 nevertheless, State Farm representatives continued to enter the house into
5 September. Mr. Hatch asked for a copy of State Farm's investigative reports. A
6 copy was promised, but not timely delivered. Mr. Hatch asked appellee Murphy to
7 send a copy of the investigative report to his lawyer. Murphy refused and said that
8 Mr. Hatch would regret having retained an attorney. Murphy also said that State
9 Farm would not have required an itemization of the property removed from the
10 house if they had not contacted a lawyer.

11 Appellants charge State Farm with concealing information received from
12 Northern Gas; also, exculpatory and other documents were alleged to have been
13 withheld or concealed from the prosecutor in the arson case. State Farm required
14 that appellants sign releases for creditors in and out of the state to give it
15 information about the appellants. These creditors were then contacted. Medical
16 releases were demanded from Mr. Hatch and one of his children; also, mental health
17 records of a daughter were demanded about a problem in 1984. Mr. Hatch's military
18 and employment records were demanded.

19 *Id.* at 1098. See also *Fletcher v. W. Nat'l Life Ins. Co.*, 89 Cal. Rptr. 78, 93 (Cal. Ct. App. 1970)
20 (holding that an insurer can be liable for intentional infliction of emotional distress for extreme
21 and outrageous behavior in claim processing); *Overcast v. Billings Mut. Ins. Co.*, 11 S.W.3d 62,
22 68-74 (Mo. 2000) (affirming award of damages for defamation based on insurer's statement that
23 insured committed arson); *Bennett v. ITT Hartford Grp., Inc.*, 846 A.2d 560, 565 (N.H. 2004)
24 (insurer's post-claim conduct taking control of product suspected of causing fire loss and
25 misrepresenting to insured that insurer would actively pursue subrogation claim against product
26 manufacturer and protect insured's recovery of uninsured losses justified independent tort claim
27 against insurer notwithstanding jurisdiction's refusal to recognize first-party bad-faith tort claim).

28 *Comment k. Fiduciary duty.* In some third-party (rather than first-party) bad-faith cases,
29 courts have characterized the insurer's duty to settle as one involving a fiduciary duty, requiring
30 the insurer to protect the insured from an excess-coverage verdict. That conception makes sense,
31 as, in the third-party context, the insurer takes over defense of the claim and, in effect, represents
32 the insured's interest in avoiding an excess judgment. See *Hartford Acc. & Indem. Co. v. Foster*,
33 528 So. 2d 255, 265 (Miss. 1988) (stating "the insurer has a fiduciary duty to look after the
34 insured's interest at least to the same extent as its own"); *Hadenfeldt v. State Farm Mut. Auto. Ins.*
35 *Co.*, 239 N.W.2d 499, 505 (Neb. 1976) (approving jury instruction characterizing third-party
36 insurer as a fiduciary); *Alt v. Am. Fam. Mut. Ins. Co.*, 237 N.W.2d 706, 712 (Wis. 1976)
37 (characterizing bad-faith refusal to settle as "breach of a known fiduciary duty"); Robert H. Jerry,
38 II, *The Wrong Side of the Mountain: A Comment on Bad Faith's Unnatural History*, 72 TEX. L.
39 REV. 1317, 1340 (1994) (observing that "the contractual undertaking of the insurer [to defend its
40 insured] is fundamentally a promise to act as a fiduciary").

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1 That situation, in which an insurer, controlling the defense, would otherwise be able to
2 jeopardize its insured’s financial interest for its own benefit is not present in the first-party
3 insurance context. See William Powers, Jr., *Border Wars*, 72 TEX. L. REV. 1209, 1229-1230 (1994)
4 (characterizing the third-party insurer as a fiduciary with regard to defending the insured while
5 observing that “third-party insurance is different from first-party insurance”); Mark Gergen,
6 *Cautionary Tale About Contractual Good Faith in Texas*, 72 TEX. L. REV. 1235, 1238-1239 (1994)
7 (distinguishing the insurer’s obligation to settle a third-party insurance claim from its obligation
8 to resolve first-party claims); see also *Pirkl v. Nw. Mut. Ins. Ass’n*, 348 N.W.2d 633, 635 (Iowa
9 1984) (distinguishing third-party settlement obligations, which involve a fiduciary relationship,
10 from first-party claims).

11 The Seventh Circuit Court of Appeals captured the difference in *Craft v. Economy Fire &*
12 *Cas. Co.*, 572 F.2d 565, 569 (7th Cir. 1978) (applying Indiana law) (citation omitted):

13 Under third party liability coverage, when the insured is sued by a third party, the
14 insurance company takes over the defense of the suit and the insured cannot settle
15 the matter without the permission of the insurer. It is this control of the litigation
16 by the insurer coupled with differing levels of exposure to economic loss which
17 gives rise to the “fiduciary” nature of the insurer’s duty. In the uninsured motorist
18 situation there is no element of “control” of the insured’s side of the litigation by
19 the insurance company which would give rise to a “fiduciary” duty. It does not
20 necessarily follow that the insurer is completely free of any obligation of good faith
21 and fair dealing to its insured, since the latter duty is based on the reasonable
22 expectations of the insured and the unequal bargaining positions of the contractants,
23 rather than the insurance company’s “control” of the litigation.

24 *Comment l. Judge and jury.* The provisions of Comment *l* are reflected in virtually all of the
25 case law on this subject. See [St. Paul Fire & Marine Ins. Co. v. Tinney](#), 920 F.2d 861, 864 (11th
26 Cir. 1991) (applying Alabama law) (holding that insured failed to introduce sufficient evidence to
27 [satisfy the burden of production on his bad-faith claim](#)); *Jeffers v. Farm Bureau Prop. & Cas. Ins.*
28 *Co.*, 2014 WL 4259485, at *4 (D. Ariz. 2014) (“[B]oth [the objective and subjective] elements
29 present fact questions ordinarily reserved for the jury.”); *Lockwood v. Geico Gen. Ins. Co.*, 323
30 P.3d 691, 696 (Alaska 2014) (assuming, without discussing, that both elements of the standard for
31 bad faith are for jury determination); *Zolman v. Pinnacol Assur.*, 261 P.3d 490, 497 (Colo. Ct. App.
32 2011) (“What constitutes reasonableness under the circumstances is ordinarily a question of fact for
33 the jury.”); *Int’l Indem. Co. v. Collins*, 367 S.E.2d 786, 788 (Ga. 1988) (“Ordinarily, the question
34 of good or bad faith is for the jury, but when there is no evidence of unfounded reason for the
35 nonpayment, or if the issue of liability is close, the court should disallow imposition of bad faith
36 penalties.”); *Willis v. Swain*, 304 P.3d 619, 637 (Haw. 2013) (“In general, whether an insurer has
37 acted in bad faith is a question of fact.”); *Kiner v. Reliance Ins. Co.*, 463 N.W.2d 9, 12 (Iowa 1990)
38 (holding that determination of bad faith was one for the factfinder); *Marquis v. Farm Fam. Mut.*
39 *Ins. Co.*, 628 A.2d 644, 648 (Me. 1993); *Miss. Power & Light Co. v. Cook*, 832 So. 2d 474, 484
40 (Miss. 2002) (approving jury instruction on whether insurer had a reasonable basis for denial of a

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1 claim); *DeBruycker v. Guar. Nat'l Ins. Co.*, 880 P.2d 819, 821 (Mont. 1994) (“The court properly
2 allowed the jury to decide whether Guaranty and Crop Hail had a ‘reasonable basis’ to deny the
3 DeBruyckers’ claim.”); *Lawton v. Great Sw. Fire Ins. Co.*, 392 A.2d 576, 580 (N.H. 1978)
4 (explaining that the determination of whether the defendant’s delay constituted bad faith is a matter
5 for the jury); *Sloan v. State Farm Mut. Auto. Ins. Co.*, 85 P.3d 230, 234 (N.M. 2004) (adverting to
6 bad-faith claims being submitted to the jury); *Skaling v. Aetna Ins. Co.*, 799 A.2d 997, 1003 (R.I.
7 2002) (explaining that “the issue of insurer bad faith is an issue of fact to be submitted to the jury”);
8 *Walz v. Fireman’s Fund Ins. Co.*, 556 N.W.2d 68, 70 (S.D. 1996) (“Whether Insurer acted in bad
9 faith in conducting an inadequate investigation or failing to review caselaw is a question of fact for
10 the jury or other trier of fact.”); [*Jerry v. Kentucky Cent. Ins. Co.*, 836 S.W.2d 812, 815 \(Tex. App.
11 1992\) \(affirming lower court’s finding, sitting as finder of fact, that insured home was vacant at
12 time it was destroyed by fire was supported by sufficient evidence\).](#)

13 [Cases holding or ruling in a way that makes the determination of reasonableness a legal
14 matter for the court when the issue turns on the meaning of policy or statutory language include:
15 *Franceschi v. Am. Motorists Ins. Co.*, 852 F.2d 1217, 1219 \(9th Cir. 1988\) \(applying California
16 law\) \(affirming grant of summary judgment on insured’s bad-faith claim when coverage depended
17 on whether policy term of “medical treatment” included diagnostic treatment\); *Starkville Mun.
18 Separate Sch. Dist. v. Cont’l Cas. Co.*, 772 F.2d 168, 170 \(5th Cir. 1985\) \(applying Mississippi law\)
19 \(affirming trial court’s dismissal of bad-faith claim where coverage turned on the meaning of the
20 word “loss” in the plaintiff’s insurance policy\); *Whitaker v. State Farm Mut. Auto. Ins. Co.*, 768
21 P.2d 320, 324 \(Kan. Ct. App. 1989\) \(affirming trial court’s determination that insured was not
22 entitled to statutory award of attorney’s fees for “unreasonable” denial of coverage based on dispute
23 over the meaning of “accident”\); *Soniat v. Travelers Ins. Co.*, 538 So. 2d 210, 216 \(La. 1989\) \(ruling
24 that insurer had a reasonable basis for denying coverage when issue revolved on interpretation of
25 whether the policy had been “terminated” or “cancelled” prior to when covered loss occurred\);
26 *Wright v. League Gen. Ins. Co.*, 421 N.W.2d 647, 650 \(Mich. Ct. App. 1988\) \(affirming trial court’s
27 grant of summary judgment on bad-faith claim where issue of reasonableness turned on meaning
28 of the phrase “involved in the accident” contained in statute governing no-fault auto-insurance
29 scheme\); *Transcon. Ins. Co. v. Washington Pub. Utilities Districts’ Util. Sys.*, 760 P.2d 337, 347
30 \(Wash. 1988\) \(affirming trial court’s determination that, while insurer’s interpretation of policy
31 language was incorrect, it acted reasonably in denying coverage and therefore was not liable for
32 bad faith\); *Starzewski v. Unigard Ins. Grp.*, 810 P.2d 58, 62 \(1991\) \(Wash. Ct. App. 1991\)
33 \(holding, as a matter of law, that while insurer’s interpretation of appropriate amount of repair costs
34 recoverable was incorrect based on policy language, insurer had reasonable basis for its position\).](#)

35 [For cases that rule as a matter of law whether there was a reasonable basis for denial of
36 coverage when the facts relevant to coverage are not in dispute, see *Case v. Toshiba Am. Info.
37 Sys., Inc.*, 7 F.3d 771, 773 \(8th Cir. 1993\) \(applying South Dakota law\) \(affirming grant of
38 summary judgment to workers’-compensation insurer sued for bad-faith denial of insured’s claim
39 based on evidence that plaintiff had a long history of smoking, an alternative and nonoccupational
40 explanation for plaintiff’s disease\); *Chateau Chamberay Homeowners Ass’n v. Associated Int’l*](#)

1 [Ins. Co., 108 Cal. Rptr. 2d 776, 785, 787 \(Ct. App. 2001\)](#) (stating “as long as there is no dispute
2 as to the underlying facts, it is for the court, not a jury, to decide whether the insurer had ‘proper
3 cause’”); [Zolman v. Pinnacle Assur., 261 P.3d 490, 499 \(Colo. App. 2011\)](#) (despite general rule
4 that determination of reasonableness by insurer is question of fact, because of evidence provided
5 by physicians that insured did not require care for which she sought coverage, ruling as a matter
6 of law was appropriate); [Bellville v. Farm Bureau Mut. Ins. Co., 702 N.W.2d 468, 474 \(Iowa 2005\)](#)
7 (“[I]f it is undisputed that evidence existed creating a genuine dispute as to the negligence of an
8 uninsured or underinsured motorist, the comparative fault of the insured, the nature and extent of
9 the insured’s injuries, or the value of the insured’s damages, a court can almost always decide that
10 the claim was fairly debatable as a matter of law.”); [Prince v. Bear River Mut. Ins. Co., 56 P.3d
11 524, 535 \(Utah 2002\)](#) (“The trial court’s conclusion that [insured’s] claim was fairly debatable
12 under the facts of this case is a question of law that we review for correctness.”).

13 The largest pocket of ~~contrary~~ decisions [contrary to the first paragraph of this Reporters’](#)
14 [Note](#) exists in the Fifth Circuit Court of Appeals, which, in cases governed by Mississippi law, has
15 repeatedly asserted that the question of whether the insurer had a reasonable basis for denying (or
16 delaying payment for) the claim is a matter of law for the court. See [James v. State Farm Mut.
17 Auto. Ins. Co., 743 F.3d 65, 70 \(5th Cir. 2014\)](#) (applying Mississippi law) (providing conflicting
18 language on whether the trial court must decide as a matter of law whether a reasonable basis for
19 denial existed); [Broussard v. State Farm Fire & Cas. Co., 523 F.3d 618, 628 \(5th Cir. 2008\)](#)
20 (applying Mississippi law) (“The question of whether State Farm had an arguable basis for denying
21 the Broussards’ claim ‘is an issue of law for the court.’”); [Dunn v. State Farm Fire & Cas. Co.,
22 927 F.2d 869, 873 \(5th Cir. 1991\)](#) (applying Mississippi law) (~~“Whether stating in a case that had
23 both factual and legal issues to determine coverage and bad faith, “[w]hether~~ State Farm had an
24 arguable reason to deny Mrs. Dunn’s claim is an issue of law for the court.”); see also 2 WILLIAM
25 T. BARKER & RONALD D. KENT, NEW APPLEMAN INSURANCE BAD FAITH LITIGATION
26 § 17.04[2][a]-[c], at 17-76 to 86 (2d ed. 2019) (arguing that determination of whether an insurer
27 had a reasonable basis for denial of a claim is a matter of law for the court, citing *James*).

28 The Fifth Circuit has persisted in this position, ~~despite the fact that~~ [even though](#) Mississippi
29 law is to the contrary. The Mississippi Supreme Court in *Cook*, supra, approved a jury instruction
30 on the issue of whether a reasonable basis existed. Indeed, on appeal of summary judgment for the
31 insurer, the same court observed that, before submitting the issue to a jury, the trial court should
32 determine that the evidence is sufficient for an affirmative finding, the usual sufficiency-review
33 standard applicable to all determinations of fact. [Jenkins v. Ohio Cas. Ins. Co., 794 So. 2d 228,
34 232 \(Miss. 2001\)](#). In *Dunn*, the Fifth Circuit cited a Mississippi case, [Bankers Life & Cas. Co. v.
35 Crenshaw, 483 So. 2d 254, 256 \(Miss. 1985\)](#), aff’d on other grounds, 486 U.S. 71 (1988), for the
36 proposition that the court is to decide whether the insurer had a reasonable basis for denying the
37 claim. But only a misreading of *Crenshaw* could support that proposition, as the case involved an
38 insurer’s appeal of a jury verdict that found bad faith and awarded punitive damages; the issue on
39 appeal was only the propriety of submitting a claim for punitive damages to the jury. Similarly,

1 the *James* court cited two Mississippi Supreme Court cases to support its statement that bad faith
2 is a matter for the court. Neither of those cases stand for that proposition.

3 Other support for the proposition that bad faith ~~or any of its components~~ is generally a
4 matter for the court is scarce. For two such cases, see *Dalrymple v. United Services Auto. Ass'n*,
5 46 Cal. Rptr. 2d 845 (Ct. App. 1995) (while articulating the standard rule of submission of bad-
6 faith issues to the jury, ruling that whether the insurer's bringing and pursuing a ~~declaratory~~
7 ~~judgment~~ declaratory-judgment action to determine coverage was appropriate was a matter for the
8 court, analogizing that determination to lack of proper cause in ~~malicious prosecution~~ malicious-
9 prosecution claim); *Koch, Administratrix v. Prudential Ins. Co.*, 470 P.2d 756, 759-760 (Kan.
10 1970) (stating that the determination of whether the insurer denied the claim without "just cause
11 or excuse" is for the court).

12 *Comment m. State* ~~unfair insurance claims practices~~ unfair insurance claims practices
13 *provisions*. Model state legislation developed by the National Association of Insurance
14 Commissioners that addresses insurers' claim processing has been enacted in at least 45 states. See
15 Diana C. White, *Liability Insurers and Third-Party Claimants: The Limits of Duty*, 48 U. CHI. L.
16 REV. 125, 146 n.75 (1981). Professor Roger Henderson explains the genesis of these statutes and
17 why they were inadequate to the task of assisting individual insureds whose insurers engaged in
18 bad faith in its handling of the claim and the concomitant need for a common-law tort claim:

19 In the 1970s, the National Association of Insurance Commissioners (NAIC)
20 began to develop model legislation aimed at unfair claims settlement practices of
21 the insurance industry. Although this legislation, or some variation of it, has now
22 been adopted by all but a half-dozen states, it has not materially aided the individual
23 claimant. The model legislation prohibits certain acts by an insurer only when
24 committed flagrantly and in conscious disregard of the statute or with such
25 frequency as to indicate a general business practice. In such circumstances, the state
26 insurance regulator is empowered to seek injunctive relief or penalties to enforce
27 the statutory provisions. This language, when coupled with the fact that the
28 legislation is silent as to any remedies on behalf of individual claimants, led the
29 courts, with only a very few exceptions, to refuse to recognize that the legislation
30 created a private cause of action on behalf of an insured for money damages. This
31 was a serious shortcoming.

32 An individual insured seldom could obtain timely relief by complaining to
33 the state insurance regulator. Without legal assistance, it was difficult for an insured
34 to prove a flagrant and conscious violation of the law or that the insurer engaged in
35 a general practice of abuse. Only after a large number of insureds complained
36 against a particular insurer could the insurance commissioner act. By that time, it
37 was usually too late for many of the insureds. Consequently, the efforts of the NAIC
38 proved to be less than adequate for the task. As a result, many individuals who had
39 been harmed by the wrongful acts of insurers were still without a remedy even when
40 complaints were filed with their state insurance commissioner.

1 In sum, the legislative and administrative responses, either through
2 provisions for attorneys’ fees and penalties or prohibitions on unfair insurer claims
3 practices in general, did not stem the tide of social pressure for relief from
4 unjustified delays in processing and arbitrary refusals to pay claims. This left only
5 one other route open to claimants—the courts.

6 Roger C. Henderson, *The Tort of Bad Faith in First-Party Insurance Transactions: Refining the*
7 *Standard of Culpability and Reformulating the Remedies by Statute*, 26 U. MICH. J.L. REFORM 1,
8 14-15 (1992). However, in some states, these statutes either explicitly, or have been interpreted to,
9 provide a private right of action for their violation, thus enabling the equivalent of a statutory ~~bad~~
10 ~~faith~~bad-faith claim against insurers. **See, e.g.,** GA. CODE ANN. § 33-4-6 (providing for penalty of
11 50% percent of the claim or ~~\$5,000~~5000, whichever is greater plus attorney’s fees); WASH REV.
12 CODE § 48.30.015(2) (providing for recovery of up to three times actual damages plus attorney’s
13 fees and costs); *Auto-Owners Ins. Co. v. Conquest*, 658 So. 2d 928, 930 (Fla. 1995) (permitting
14 private action for violation of Florida ~~unfair-claims-practices~~unfair-claims-practices act); **see**
15 **generally** BARKER & KENT, supra § 10 (comprehensive cataloguing of state statutes addressing
16 insurer behavior).

17 Describing a private suit against an insurer for bad faith based on violation of a statute
18 regulating insurance practices ~~as~~ “negligence per se” is a bit of a misnomer in two respects:
19 First, bad faith is not a negligence tort, see Comment *e*; and ~~2)second~~, in some jurisdictions, the
20 suit may be based on an implied right of action under the statute rather than as a common-law
21 matter. Of course, the statute might provide for an express private right of action; in such case
22 there is no need to address negligence per se as the statute provides the basis for the claim.

23 In some states, statutory language clearly establishes that the insured is or is not entitled to
24 bring a private right of action for a violation of a state statute regulating insurance practices. Some
25 statutes explicitly provide that no private right of action exists. See, e.g., ALASKA STAT.
26 § 21.36.125(b). Some statutory provisions, to the contrary, expressly furnish a private right of
27 action for violation of specified claims practices. See, e.g., ARK. CODE ANN. § 23-79-208(a)(1)
28 (providing a private claim for failing to pay losses within the time specified in the insurance policy
29 and providing remedies of an additional 12 percent of the loss and attorney’s fees); WYO. STAT.
30 ANN. § 26-15-124 (providing attorney’s fees and 10 percent interest for failure to pay a claim
31 within 45 days of a claim). See generally 1 BARKER & KENT, supra § 1.07[2], at 1-40.

32 When the statute is arguably susceptible to either interpretation, most courts have denied a
33 private right of action arising from violation of a state’s ~~unfair-claims-practices~~ act. See, e.g.,
34 *Lockwood v. Geico Gen. Ins. Co.*, 323 P.3d 691, 697 n.15 (Alaska 2014); see also STEPHEN S.
35 ASHLEY, *BAD FAITH ACTIONS LIABILITY & DAMAGES* § 9:3 (updated 2021) (“Though a few states
36 have agreed with the conclusion that the unfair claims settlement practices statutes support private
37 claims, most have rejected private causes of action.”). For a rare case that finds that the state’s
38 ~~unfair-claims-practices~~ act impliedly creates a private right of action, see *Farmer’s Union Cent.*
39 *Exch. Inc. v. Reliance Ins. Co.*, 626 F. Supp. 583, 590 (D.N.D. 1985) (stating, in the absence of
40 state authority: “This court concludes that the duties imposed by [the state’s ~~unfair-claims-~~

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practices act] may be the basis for an action sounding in tort. It is apparent from the provisions of that chapter that the statute was enacted to protect persons filing claims against insurers.”).

In jurisdictions with statutes that limit their scope to a practice of such violations, negligence per se would only be applicable upon proof of sufficient repetition. See *Karas v. Liberty Ins. Corp.*, 33 F. Supp. 3d 110, 117 (D. Conn. 2014) (recognizing a claim for violation of Connecticut’s ~~claims-practices~~claims-practices act, but noting that the act requires proof that defendant committed ~~unfair-claims-practices~~unfair-claims-practices acts with sufficient frequency to demonstrate a general business practice). For courts recognizing a negligence per se bad-faith claim for violation of the state’s unfair-claims-practices act, see, e.g., *Moody v. Oregon Cmty. Credit Union*, 505 P.3d 1047, 1052, review allowed, 369 Or. 855 (2022); *Barefield v. DPIC Cos., Inc.*, 600 S.E.2d 256 (W. Va. 2004). See generally 14A STEVEN PLITT ET AL., COUCH ON INSURANCE § 204:51 (3d ed. updated 2022).

Courts have repeatedly rejected the argument that state regulation, including ~~claims practices~~claims-practices regulation, preempt the bad-faith tort. See, e.g., *State Farm Fire & Cas. Co. v. Nicholson*, 777 P.2d 1152, 1157 (Alaska 1989) (“[T]he State has limited means with which to police the insurance industry. Furthermore, the statutory remedies fail to compensate the insured for damages involved in the insurer’s bad faith denial of coverage.”); *Aetna Cas. & Sur. Co. v. Broadway Arms Corp.*, 664 S.W.2d 463, 465 (Ark. 1984) (“Neither of these [statutory provisions regulating insurers and providing] remedies deals with the area of bad faith much less pre-empts it.”); *McCullough v. Golden Rule Ins. Co.*, 789 P.2d 855, 859 (Wyo. 1990) (“Preclusion by alternative statutory remedy has been denied acceptance in most jurisdictions unless the remedy would be as broad as the bad faith tort claim.”).

~~In some states, statutory language clearly establishes that the insured is or is not entitled to bring a private right of action for a violation of a state statute regulating insurance practices. Some statutes explicitly provide that no private right of action exists. See, e.g., ALASKA STAT. § 21.36.125(b). Some statutory provisions, to the contrary, expressly furnish a private right of action for violation of specified claims practices. See, e.g., ARK. CODE ANN. § 23-79-208(a)(1) (providing a private claim for failing to pay losses within the time specified in the insurance policy and providing remedies of an additional 12 percent of the loss and attorney’s fees); WYO. STAT. ANN. § 26-15-124 (providing attorney’s fees and 10 percent interest for failure to pay a claim within 45 days of a claim). See generally 1 BARKER & KENT, supra § 1.07[2], at 1-40.~~

~~When the statute is arguably susceptible to either interpretation, most courts have denied a private right of action arising from violation of a state’s ~~unfair-claims-practices~~ act. See, e.g., *Lockwood v. Geico Gen. Ins. Co.*, 323 P.3d 691, 697 n.15 (Alaska 2014); see also STEPHEN S. ASHLEY, BAD FAITH ACTIONS LIABILITY & DAMAGES § 9:3 (updated 2021) (“Though a few states have agreed with the conclusion that the unfair claims settlement practices statutes support private claims, most have rejected private causes of action.”). For a rare case that finds that the state’s ~~unfair-claims-practices~~ ~~impliedly act~~ creates a private right of action, see *Farmer’s Union Cent. Exch. Inc. v. Reliance Ins. Co.*, 626 F. Supp. 583, 590 (D.N.D. 1985) (stating, in the absence of state authority: “This court concludes that the duties imposed by [the state’s ~~unfair-claims-practices~~~~

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1 ~~act] may be the basis for an action sounding in tort. It is apparent from the provisions of that chapter~~
2 ~~that the statute was enacted to protect persons filing claims against insurers.”).~~

3 *Comment n. Negligence and honest mistakes.* Illustration 4, involving the home collapse,
4 is based loosely on *Barry v. Nationwide Mut. Ins. Co.*, 298 F. Supp. 3d 826 (D. Md. 2018).

5 *Comment o. Damages.* Because bad faith is a tort, rather than contract, claim, consequential
6 damages are determined based on tort law, which permits recovery of all damages within the
7 tortfeasor’s scope of liability (proximate cause). See Restatement of the Law, Liability Insurance
8 § 5, Reporters’ Note to Comment *a* (AM. L. INST. 2019). Because bad faith in ~~insurance~~
9 ~~claims~~insurance-claims processing is a category of conduct that has significant potential to cause
10 emotional harm, damages for such harm are also available. Restatement Third, Torts: Liability for
11 Physical and Emotional Harm § 47(b) (AM. L. INST. 2012) (permitting recovery for negligently
12 inflicted emotional distress for categories of “activities, undertakings, or relationships” in which
13 negligent conduct is especially likely to cause serious harm”). Consistent with that principle, most
14 courts that have addressed the matter permit recovery for emotional harm. See, e.g., *Time Ins. Co.*
15 *v. Burger*, 712 So. 2d 389, 393 (Fla. 1998) (finding that a plaintiff is authorized to recover “damages
16 for emotional distress in a first-party bad faith claim against a health insurance company”); see also
17 WILLIAM T. BARKER & RONALD D. KENT, *NEW APPLEMAN INSURANCE BAD FAITH LITIGATION*
18 § 9.04[4][d], at 9-18 (2d ed. 2019) (“In a few jurisdictions, recovery of emotional distress damages
19 is not permitted or is specially limited.”); STEVEN PLITT ET AL., *COUCH ON INSURANCE* (3d ed.
20 updated 2022) (“In those jurisdictions where a bad-faith claim is viewed as sounding in tort, the
21 insured can obtain a full range of damages, including those for emotional distress . . .”).

22 In addition, the insured’s spouse and children may have a claim for loss of consortium
23 when the insured’s emotional distress had a detrimental effect on the relationship with the
24 insured’s family member. See Restatement Third, Torts: Liability for Physical and Emotional
25 Harm § 48 A, Comment *n* (in Restatement Third, Torts: Concluding Provisions (now known as
26 Restatement Third, Torts: Miscellaneous Provisions) (Tentative Draft No. 1, 2022)); *id.* § 48 C,
27 Comment *d*; BARKER & KENT, *supra* § 9.04[4][a], at 9-16. Courts affirming recovery for loss of
28 consortium for insurer bad faith include: *Skinner v. Metro. Life Ins. Co.*, 829 F. Supp. 2d 669, 687
29 (N.D. Ind. 2010); *Poling v. Motorists Mut. Ins. Co.*, 450 S.E.2d 635, 638 (W. Va. 1994) (third-
30 party insurance). But see *Bornstein v. Fireman’s Fund Ins. Co.*, 623 F. Supp. 814, 816 (E.D. Wis.
31 1985) (denying claim for consortium because insurer owed no contractual obligation to spouse).

32 Either by statute or common-law decision, insureds may recover attorneys’ fees required
33 to establish coverage for the insured’s loss. See, e.g., GA. CODE ANN. § 33-7-11 (providing for
34 recovery of attorneys’ fees for bad faith in failing timely to pay uninsured motorist benefits); N.H.
35 REV. STAT § 491:22-b (authorizing attorneys’ fees in ~~declaratory judgment~~declaratory-judgment
36 action to establish coverage); 42 PA. STAT. AND CONS. STAT. ANN. § 8371 (providing for recovery
37 of attorneys’ fees when insurer acts in bad faith); *Allen v. USAA Cas. Ins. Co.*, 2022 WL 19646,
38 at *4 (N.D. Ala. 2022) (holding insureds could recover attorneys’ fees if successful in their bad-
39 faith claim against homeowners’ insurer); *Mustachio v. Ohio Farmers Ins. Co.*, 118 Cal. Rptr. 581,
40 584 (Ct. App. 1975) (“It follows as a matter of course that if the insurer’s tortious conduct makes

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1 it reasonable for the insured to seek the protection of counsel, the insurer is responsible for that
2 item of damages.”). See also *Lemasters v. Nationwide Mut. Ins. Co.*, 751 S.E.2d 735, 737 (W. Va.
3 2013) (holding insureds could recover attorneys’ fees incurred in establishing coverage for
4 uninsured-motorist-coverage claim but not fees for prosecuting bad-faith claim); Restatement of
5 the Law, Liability Insurance § 50, Comment *b* (AM. L. INST. 2019) (same).

6 Numerous cases support the view contained in Comment *o* on the availability in bad-faith
7 litigation of punitive damages for sufficiently culpable insurer behavior. Some include *Rawlings*
8 *v. Apodaca*, 726 P.2d 565, 578 (Ariz. 1986) (“Thus, we establish no new category of punitive
9 damages for bad faith cases. Such damages are recoverable in bad faith tort actions when, and only
10 when, the facts establish that defendant’s conduct was aggravated, outrageous, malicious or
11 fraudulent.”); *Enrique v. State Farm Mut. Auto. Ins. Co.*, 142 A.3d 506, 512 (Del. 2016) (declaring
12 that “punitive damages are available as a remedy for bad faith breach of the implied covenant of
13 good faith where the plaintiff can show malice or reckless indifference by the insurer”); *Best Place,*
14 *Inc. v. Penn Am. Ins. Co.*, 920 P.2d 334, 347 (Haw. 1996), as amended (June 21, 1996) (adopting
15 general standard of culpability for punitive damages in bad-faith claims); *Weinstein v. Prudential*
16 *Prop & Cas. Ins. Co.*, 233 P.3d 1221, 1251-1253 (Idaho 2010) (analyzing whether newly enacted
17 statute governing punitive damages was applicable to bad faith based on when that claim arose);
18 *Erie Ins. Co. v. Hickman*, 622 N.E.2d 515, 520 (Ind. 1993) (“The standard for awarding punitive
19 damages for the commission of a [bad-faith] tort remains unchanged.”); *Pioneer Life Ins. Co. of*
20 *Illinois v. Moss*, 513 So. 2d 927, 930 (Miss. 1987) (explaining that bad faith is insufficient for
21 recovery of punitive damages, which requires, in addition, proof of “willful or malicious wrong,
22 or act[ing] with gross or reckless disregard for the insured’s rights”); *U. S. Fid. & Guar. Co. v.*
23 *Peterson*, 540 P.2d 1070, 1072 (Nev. 1975) (“While the record supports the court’s determination
24 that there was sufficient evidence of the insurance company’s bad faith to justify an instruction on
25 consequential damages, the necessary requisites to support punitive damages are not present.”);
26 *Anderson v. Cont’l Ins. Co.*, 271 N.W.2d 368, 379 (Wis. 1978) (declaring that bare proof of bad
27 faith was insufficient for punitive damages, which additionally requires a showing of “aggravation,
28 insult or cruelty, with vindictiveness or malice”).